

**United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001**

Date: July 11, 1997

Case No.: 95 INA 464

In the Matter of:

ACTOR'S STUDIO WEST,
Employer,

on behalf of

TONY BENSON,
Alien

Appearance: M. E. Orr, Esq., of Orange, California

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

Decision and Order

This case arose from a labor certification application that was filed on behalf of Tony Benson (Alien) by Actor's Studio West (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at San Francisco, California, the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.¹

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

alien will not adversely affect the wages and working conditions of United States workers similarly employed.

Statement of the Case

On December 6, 1993, the Employer filed an application for labor certification on behalf of the Alien, Tony Benson, to fill the position of "Teacher, Drama (Elocution)." (AF 22). The job duties were described as follows:

Will be required to teach shakespearean [sic] enunciation, voice diction and voice development and dialects, verse and prose and acting principles and techniques. Will also discuss and demonstrate vocal and body expression to teach acting styles, character development and personality projection. Instructions will include voice exercise, speech drills, explanations, lectures and improvisations.

The stated job requirements were a high school education and four years of experience. (AF 22).

Notice of Findings. On October 6, 1994, the CO's a Notice of Findings (NOF) notified the Employer that certification would be denied, subject to rebuttal. The reasons for denial of certification were that (1) the position appeared to have been created for the Alien, which was contrary to 20 CFR § 656.20(c) (8); (2) the Employer is not registered with the State of California as a tax-paying entity; (3) the Employer is listed under theatrical agencies rather than acting schools in the telephone directory, and appears to derive its income from helping actors or models obtain jobs; and (4) while the Employer is petitioning for a drama teacher, elocution, its 1993 brochures as submitted did not indicate that it offers classes specializing in Shakespearean elocution/diction. To rebut, the Employer was directed to (1) demonstrate that it is in fact a registered tax-paying entity with the State of California; and (2) Establish that it is offering a position for a drama instructor to teach Shakespearean enunciation/diction by providing class schedules, the number of students enrolled, and other evidence that it is a bona fide school of instruction for actors. In addition, the Employer was ordered to submit clarifying evidence regarding the alien's current work history. AF 18-20.

Rebuttal. The Employer's responded to the NOF consisted with a rebuttal that consisted of its attorney's letter dated November 10, 1994, and a brochure. AF 04-06. The Employer conceded that it was not registered with the State of California as a tax paying business entity. The Employer explained that it did not have any employees on the payroll at this time because it pays its drama instructors "as independents," i.e., independent

contractors. The Employer added that usually only the teachers with "specialized skill and knowledge required payment as a salaried employee." Employer disagreed with the inference that it derived its income from helping models and actors obtain jobs, contending that the brochure established that the primary purpose of its business was the teaching of acting techniques. Employer argued that in the past its owner was been "in the position of teaching better diction through Shakespearean enunciation" and relied on the services of outside contractors who provided the services on a contractual basis." Due to the demand for the services of the Employer, however, its owner was unable to provide all students with training in enunciation and for this reason the Employer had undertaken to hire its "first full-time permanent paid employee." AF 04-06.

Final Determination. As this rebuttal was unpersuasive, the CO's Final Determination of December 9, 1994, denied Employer's application for certification. (1) The CO found that Employer was not in compliance with 20 CFR §656.20(c)(8), which requires the applicant to establish that the position has been and is clearly open to any qualified U. S. worker. AF 02-03. (2) The CO found, moreover, that based on the stated job duties the Alien has been and would be working as an independent contractor, a business arrangement which Employer has used in the past in the operation of a school to teach and train aspiring actors. This requires proof that a bona fide permanent position exists within the meaning of 20 CFR § 656.3, which defines employment as permanent full time work by an employee for an employer other than oneself.² (3) The CO also noted that the applicants had failed to submit signed statements regarding the Alien's current work history, nor had the Employer submitted documentation that it was a registered tax-paying business entity with the State of California.

Appeal. Employer requested review of the Final Determination on January 3, 1995. AF 01.

Discussion

The requirement of a bona fide job opportunity arises out of 20 CFR § 656.20(c)(8), which requires an employer to attest that the "job opportunity has been and is clearly open to any qualified U.S. worker." As the Employer has argued that client demand requires that he hire a full time employee, we observe that where an employer concedes that a job opening exists solely because of its client's needs, it must demonstrate that the job is permanent and full time. Integrated Support Systems Inc., 93

²By definition, 20 CFR § 656.3 excludes self-employment from all references to employment under the Act and regulations.

INA 211 (June 28, 1994).³

In addressing this issue, the NOF directed the Employer to document the existence of a schedule of classes and describe the student enrollment in order to substantiate the allegation that bona fide job exists opening for a drama teacher to teach Shakespearean elocution/diction to the Employer's students. The brochure that the Employer submitted does not provide the class and student enrollment information required by the NOF, however. Moreover, this omission was not filled by Employer's undocumented rebuttal statement that it has turned away business, which is self-serving and unpersuasive.

It is well established that the employer bears the burden of proving that the position is permanent and full time. If the employer's evidence does not show that the position is permanent and full time, certification must be denied. Gerata Systems America, Inc., 88 INA 344 (Dec. 16, 1988). The Employer clearly failed to provide the documentary evidence necessary to prove that the job at issue is full time employment. Accordingly, we find that certification was properly denied by the Certifying Officer. For this reason it is not necessary to address the remaining issues.

Accordingly, the following order will enter.

Order

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

Judge Holmes dissenting.

I respectfully dissent. I believe the Employer has carried his burden of demonstrating that a bona fide job opportunity exists for full-time employment, even while acknowledging that

³The Court in *Pasadena Typewriter and Adding Machine Co., Inc. & Alirez Rahmaty v. U.S. Dept. of Labor*, No. CV 83-5516-AABT(C.D,Cal. 1987), held that the administrative construction of 20 CFR § 656.20(c)(8) that the offered position must be bona fide clarifies the requirement that a job must truly exist, noting that the administrative interpretation advances the purpose of 20 CFR § 656.3, the definition of employment mentioned above.

the circumstances of employment are unusual and raise legitimate suspicions that the job opportunity may be tailored to Alien's experience and skills. Moreover, at time of application, Employer's business was relatively new and documentation rightfully required by the CO. I would remand for inquiry by the CO as to whether or not Employer's then projected business had expanded in the manner anticipated and, if so, and presuming the job position was still necessary, have labor certification granted.

John C. Holmes
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

Sheila Smith, Legal Technician

BALCA VOTE SHEET

CASE NO.: 95-INA-464

ACTOR'S STUDIO WEST, Employer,
TONY BENSON, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	:	:	:	:	:
	:	CONCUR	:	DISSENT	:
	:	:	:	:	:
	:	:	:	:	:
Holmes	:	:	:	:	:
	:	:	:	:	:
	:	:	:	:	:
	:	:	:	:	:
Huddleston	:	:	:	:	:
	:	:	:	:	:
	:	:	:	:	:

Thank you,

Judge Neusner

Date: June 23, 1997